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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 09-50026-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, ET AL.,
F/K/A GENERAL MOTORS CORP., ET AL.,

Debtors.

- - - - -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

February 10, 2011
9:47 AM

B E F O R E:
HON. ROBERT E. GERBER
U.S. BANKRUPTCY JUDGE

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HEARING re Debtors' Objection to Proofs of Claim Nos. 16440 and
16441

Transcribed by: Sharona Shapiro

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning. Have seats, please.

Okay. GM Motors Liquidation. Let me get appearances
and then I have a couple of preliminary comments.

MS. ZAMBRANO: Good morning, Your Honor. Angela
Zambrano with Weil Gotshal & Manges on behalf of the debtors.
And with me is --

THE COURT: Okay, Ms. Zambrano. And with you, please?

MS. ZAMBRANO: Pablo Falabella.

THE COURT: Fala --

MR. FALABELLA: Falabella.

THE COURT: Falabella. Thank you.

MR. SCHWARTZ: Michael Schwartz with Horwitz ,Horwitz
& Paradis on behalf of Saturn class plaintiffs.

THE COURT: Right, Mr. Schwartz.

MR. SCHWARTZ: And with me is Gina Tufaro from our
office.

THE COURT: Okay, thank you.

All right. Well, make your presentations as you see
fit, folks. But at the risk of stating the obvious, since the
briefing on today's motion was initiated, I issued the GM
apartheid decision and obviously it has great relevance to the
issues that we're dealing with today.

Mr. Schwartz, I'm going to look to you to help me

1 understand the actual or perceived differences between the
2 class certification motion here and the one that I denied in
3 the apartheid matter. And although I think the issues are
4 different vis-a-vis the 23(b)(3) predominance issues, I have
5 concerns that the 23(b)(3) preferability of class action
6 concerns remain of major concern to me. And the issues
7 vis-a-vis the extent to which bankruptcy considerations are
8 superimposed upon traditional 23(a) and (b) doctrine also are a
9 matter of concern to me.

10 I do want both sides to address insofar as 23(b)
11 predominance issues are concerned and also superiority of class
12 action, the creation of the subclasses which are both more
13 numerous and somewhat more technically distinct from a law
14 perspective than they were in the apartheid but which also, at
15 least seemingly, raise some of the main manageability concerns
16 that I dealt with in the apartheid case.

17 Mr. Schwartz, let me hear from you first. And if
18 you'd come up to the main lectern, please, I'd appreciate that.

19 MR. SCHWARTZ: Your Honor, obviously we're not going
20 to revisit the issues addressed in apartheid with respect to
21 timing. Your Honor made it very clear --

22 THE COURT: Pause, please, Mr. Schwartz. Can you pull
23 the microphone closer to you? I'll try to raise the volume.

24 MR. SCHWARTZ: Sure. Is that better, Your Honor?

25 THE COURT: I have it on maximum volume. I'll be able

1 to tell you in a minute. Go ahead, please.

2 MR. SCHWARTZ: Okay, Your Honor. We are not going to
3 address any issues that Your Honor made perfectly clear in
4 apartheid regarding the timing of the filing of our motion.
5 But with respect to superiority of the class action device
6 here, we think an important point to note is Old GM has made
7 the point that not one punitive class member has filed a claim
8 in the bankruptcy court against the Old GM.

9 That begs the question if there are thousands of
10 people who have bought these Saturn cars and incurred damages
11 and repairs of thousands of dollars, as evidenced by the
12 complaints made to Old GM, made to NHTSA, made on the Internet
13 and in forums, why haven't they done so? And we believe the
14 only reason they haven't done so is they may have known that
15 Old GM filed for bankruptcy but they did not know that they
16 bought a car with a defective part which caused them damage and
17 therefore they would have no reason to file a claim in the
18 bankruptcy court.

19 THE COURT: If they didn't know that they have claims,
20 except for that number, which I don't know whether it's zero or
21 in the thousands or in the tens of thousands, for whom the
22 problem arose between June 9th of or 1st of 2009 -- I forgot
23 the exact date that this case was filed -- and now, how would
24 we know whether they're members of the class or not?

25 MR. SCHWARTZ: Well, through -- if the Court would

1 certify the class they would get notice and they would file a
2 claim through that procedure. That information is available
3 through different sources. People who have bought the cars,
4 there's warranty information that the car manufacturers use
5 that are available that can identify who these people are and
6 they can be given the opportunity to submit information
7 demonstrating that they purchased or leased one of the Saturn
8 vehicles and that they incurred repairs as a result of the
9 defect that we allege which is the broken timing chain.

10 THE COURT: Um-hum. Okay, continue, please.

11 MR. SCHWARTZ: With respect to the 23(b)(3) issues,
12 Your Honor, we think that -- well, the apartheid --

13 THE COURT: Excuse me.

14 MR. SCHWARTZ: Bless you, Your Honor. The apartheid
15 claims obviously were tort claims which, as the Court
16 recognized, they're very difficult to treat in a class action
17 manner.

18 The claims asserted by the Saturn plaintiffs, which
19 are breach of implied warranty of merchantability and state
20 consumer fraud claims, those are often class because they can
21 be dealt with on -- there's class-wide proofs regarding the
22 legal issues and the factual issues. They're all going to
23 center on the defective design of the vehicles. And those
24 cases and those claims are not troublesome to class up.

25 THE COURT: The extent to which GM did a substandard

1 job in designing the timing chains, subject to Ms. Zambrano's
2 rights to be heard, fairly plainly seems to me to present a
3 common issue within 23(a) requirements.

4 The problems that I have with predominance take the
5 alleged deficiencies in GM's design as a given. The problems I
6 have with 23(b) as contrasted -- or 23(b)(3) predominance as
7 contrasted to class action superiority and also as contrasted
8 to bankruptcy concerns, are the different ways by which the
9 problems might have manifested themselves. And if I heard you
10 right, you recognized that by saying that some of them may not
11 even to this day know whether or not their timing chains have
12 caused them problems or will cause them problems or not.

13 But the diversity in the law that would be tacked onto
14 the deficiencies, the uncertainties as to where the consumer is
15 in the progression of aggravation and damage, the issue that at
16 least some of these vehicles may have been sold, some of them
17 have been serviced, successfully in some cases, unsuccessfully
18 in others, as a possibility. I don't know if I have evidence
19 as to how many hundreds or thousands of people might be in each
20 of these various categories. Those are the matters that
21 scratch my head. And the diversity in the applicable law,
22 although I understand you're trying to deal with that by
23 creation of subclasses. Can you help me with that stuff,
24 please, Mr. Schwartz?

25 MR. SCHWARTZ: Sure. One issue I think the Court was

1 touching on, to us is really a damage issue, which I think in
2 the apartheid decision the Court recognized that individual
3 questions of damages would not preclude a class. The
4 individual --

5 THE COURT: If they're the only concern, that's
6 correct.

7 MR. SCHWARTZ: Right.

8 THE COURT: Or at least that's my understanding of the
9 law.

10 MR. SCHWARTZ: Right. We understand, Your Honor.
11 Whether someone has had their vehicle repaired, that's easily
12 demonstrated by a repair record, which many of our plaintiffs
13 have -- the ones that are repaired. Other ones may have their
14 cars sitting there because they can't afford to repair it, but
15 they've had it looked by mechanics.

16 And as our expert has testified, these vehicles rolled
17 off the assembly line with the defect, with an oiling nozzle
18 which would not produce enough oil to keep the timing chains
19 properly lubricated. That's the manifestation. When -- over
20 time, as these timing chains became brittle because of the lack
21 of oil, and damages occurred. That's, again, demonstrated by
22 either documentary evidence from the individual class members
23 that they brought their cars to a mechanic and they had the
24 timing chains repaired, replaced, or whether they had to have
25 their whole engine replaced to the extent of damages. So

1 again, we think that's easily provable by documentary evidence
2 by the individual class members.

3 As to the classes and the subclasses. There's -- one
4 class would be the six individual states where we have a claim
5 for breach of implied warranty. That should not be
6 problematic, because again, it's each individual state. Each
7 individual state law would apply to each of those classes.
8 Again, common proof as to law and the facts. The other six
9 classes are the consumer fraud acts, again, for individual
10 states. And those, again are common, whether the state laws
11 apply for each one of those states. We recognize it gets a
12 little more complicated, perhaps al --

13 THE COURT: Well, on the fraud, I have bigger problems
14 than I do on warranty. Your opponent is likely going to say
15 that if they last for X thousand miles, it may be a problem but
16 it's not -- that's what express warranties are for and that
17 goes beyond implied warranty. But that's an issue on the
18 merits and I will understand that.

19 But when you get into fraud, I have different
20 problems. Because I gathered there's an evolution in your
21 claims between the time that the complaint was originally filed
22 and now vis-a-vis your reliance on what dealers may have said
23 orally. And of course, oral representations always place great
24 problems on class certification. But you're saying,
25 essentially, that it's an omissions case.

1 MR. SCHWARTZ: Correct.

2 THE COURT: But this is a different kind of omissions
3 case than a '34 Act fraud case where there are publicly
4 available disclosures made to all and where there are duties to
5 speak necessary to make the financial disclosures and the 10-Ks
6 and 10-Qs nonmisleading. Am I right that you're still
7 asserting fraud by reason of omissions if not also oral
8 representations?

9 MR. SCHWARTZ: Strictly an omissions case, Your Honor.
10 And the omissions are based --

11 THE COURT: You said "strictly an omissions case"?

12 MR. SCHWARTZ: Yes.

13 THE COURT: Okay.

14 MR. SCHWARTZ: Not a misrepresentation. The Old GM
15 pointed some statements in the complaint regarding timing
16 chains that Old GM made that those were all prior to the class
17 period and those were more of a way of background than any type
18 of statement that we allege and class members would have relied
19 on. The omissions, Your Honor, are based on the fact that we
20 allege Old GM knew, when they designed these vehicles and put
21 them on the road, that they had a problem.

22 And we support that in the complaint with allegations
23 that three years prior to introducing these Saturn vehicles,
24 Old GM had a very similar problem in other vehicles where they
25 had timing chains breaking because of lack of lubrication.

1 Therefore, when they designed these cars they knew that this
2 pintle valve they put in the timing chain to restrict the flow
3 of oil was going to cause a problem. And that's the omission.

4 We allege the class plaintiffs would not have bought
5 these cars with these steel timing chains had they know that
6 there was going to be a defect that would manifest itself
7 during the life of the vehicle. And our experts opine that
8 this defect would manifest during the use and the life of the
9 vehicle.

10 THE COURT: In other words, you're saying that GM knew
11 about the problem from its '98s or whatever the year exactly
12 was -- but in the 90s. And then when it sold cars in the
13 2000s, it knew that it had the same problem and that it had a
14 duty to tell the buyers of the world that there was this issue
15 with the timing chains?

16 MR. SCHWARTZ: Correct, Your Honor.

17 THE COURT: Um-hum. Keep going.

18 MR. SCHWARTZ: Okay.

19 THE COURT: I interrupted you when you were going
20 class-by-class.

21 MR. SCHWARTZ: Right.

22 THE COURT: And you talked about six states-worth of
23 breach of implied warranty. And then I lost the number of
24 states, but there were a number of states on their consumer
25 fraud statutes under which omissions would be allegedly a

1 ground for a cause of action under the law of those particular
2 states.

3 MR. SCHWARTZ: It would be the same six states, Your
4 Honor.

5 THE COURT: Okay.

6 MR. SCHWARTZ: Those are the states each of the
7 plaintiffs resided in.

8 THE COURT: Continue, please.

9 MR. SCHWARTZ: Okay. We recognize that the grouping
10 states where we grouped states -- twenty-eight states that had
11 similar or nearly identical breach of implied warranty laws,
12 that could be difficult. And the Court does, obviously, have
13 the ability to certify part of the class and not others if the
14 Court deemed it would be too troublesome in the bankruptcy
15 setting to deal with. And we recognize that.

16 And perhaps those twenty-eight states, while in a
17 normal class action setting, would be something the Court could
18 deal with, they are more difficult in this setting and would
19 take much more time, because there needs to be a comparison --
20 which we've done -- of the laws in the twenty-eight states, to
21 show that they're all identical or at least extremely similar;
22 that there would be common burdens of proof, classwide.

23 THE COURT: Um-hum. I'm with you so far. Do you have
24 anything further on that subject?

25 MR. SCHWARTZ: No, Your Honor. Nothing else that's

1 not in the brief.

2 THE COURT: Okay. Then I'll ask you if you have other
3 points, generally?

4 MR. SCHWARTZ: Generally, no, Your Honor.

5 THE COURT: Very well.

6 MR. SCHWARTZ: We'll rest on our papers.

7 THE COURT: Okay, thank you.

8 I'm going to hear from Ms. Zambrano and then give you
9 a chance to reply, Mr. Schwartz. And I'm going to give Ms.
10 Zambrano a chance to surreply, but limited only to what you say
11 in reply.

12 MR. SCHWARTZ: Thank you, Your Honor.

13 MS. ZAMBRANO: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MS. ZAMBRANO: I'm going to turn right to Rule 23,
16 because I think that is the Court's focus this morning. I
17 agree with the Court that the issues with respect to Rule 23
18 are different here than we dealt with in Apartheid. I'm not
19 going to spend any time with Rule 23(a), based on the Court's
20 comments.

21 THE COURT: Wisely.

22 MS. ZAMBRANO: I will say, though, that --

23 THE COURT: Well --

24 MS. ZAMBRANO: -- there's a lot of evidence --

25 THE COURT: -- actually, I said "wisely" too glibly.

1 There is a 23(a) issue concerning -- or potentially so --
2 concerning the fact that some apparently meaningful number of
3 members of the class may not know that they have claims and
4 that the proposal is to identify them at proof of claim time in
5 the class action meaning of proof of claim as contrasted to the
6 bankruptcy proof of claim.

7 MS. ZAMBRANO: Yes.

8 THE COURT: But I see this as mainly a 23(b)(3)
9 predominance in manageability, still, over 23(a).

10 MS. ZAMBRANO: Agreed. I was just going to say that,
11 well, two things. First of all, I think what you just referred
12 to is, in the case law, it's kind of a no-man's-land whether
13 it's 23(a) or 23(b). But it's the concept of having an
14 ascertainable class. And there are two reasons -- it's not in
15 the text, obviously, of Rule 23, but it's been developed for
16 the commonsense reason that if you're going to certify a class,
17 you have to a) understand and be able to identify who's in that
18 class; and 2) you have to make sure that the class is not too
19 broad so that it covers people who have not been injured.

20 And there are both of those problems that are present
21 here in addition to the 23(b) problems that we will talk about.
22 First of all, with respect to the ascertainability, I think
23 Your Honor sort of nailed it in your questioning. You can't
24 identify who is injured here, who has had their timing chain
25 break, short of individualized proof. And I think what

1 claimant's counsel said, if I heard him right, is this won't be
2 a problem. Individuals will come forward with evidence on
3 that. But that's exactly the problem, is that you can't just
4 identify who the class is short of having individualized proof.
5 And that's a problem.

6 We cited a case in our brief called the Sanneman case.
7 It's a Pennsylvania federal case. It's 191 --

8 THE COURT: In your initial brief or your reply?

9 MS. ZAMBRANO: In our reply, Your Honor.

10 THE COURT: Give me a second, please. I want to find
11 it in the table of cases.

12 MS. ZAMBRANO: Okay.

13 THE COURT: It sounded like Sanneman?

14 MS. ZAMBRANO: It is. I apologize. I'm quite ill.
15 Sanneman, S-A-N-N-E-M-A-N.

16 THE COURT: Just a second, please. I see, versus
17 Chrysler?

18 MS. ZAMBRANO: Correct. And the same problem was
19 present there and it troubled the Court because you couldn't
20 identify the class members short of having the individualized
21 proof. Now, that also affects the 23(b) predominance analysis
22 as well. But just focusing on ascertainability, again, that's
23 a problem. And to be honest with you, I have struggled with
24 determining whether their class is people who have the problem
25 and it's latent, or is it the problem -- is it people who have

1 the problem and their timing chain has failed?

2 I thought in the complaint it was the broader group of
3 people. In their proof of claim submissions, or at least their
4 response to our objection, it seemed to be just the people who
5 had the timing chain actually break. When I heard Mr. Schwartz
6 talk today, again, I'm confused as to what class they're trying
7 to certify. Either way, there's going to be an
8 ascertainability problem.

9 The second component of ascertainability that I
10 mentioned and that we have here that's a problem is that the
11 class is too broad, because it includes people that have not
12 been harmed. And I don't mean they haven't been harmed because
13 they were the subject of the 40,000 cars that were recalled and
14 therefore they've had their problem fixed. What I mean is that
15 there was a large group, according to legacy GM's records,
16 that -- and this was known in the litigation below -- that had
17 their vehicles fixed under a warranty. And so again, they have
18 not been damaged. The company covered those claims. So the
19 current class definition is too broad, because it includes
20 people that have not been harmed.

21 Now, the other thing I would --

22 THE COURT: Pause, please, Ms. Zambrano. Did the
23 company stop replacing the chains when contractual warranties
24 came to their term duration?

25 MS. ZAMBRANO: I haven't consulted with the company,

1 but I'm going to assume for purposes of today that they did,
2 yes. But there's still the class problem. Because the way
3 that it's defined, it includes people that are covered under
4 the class definition; they purchased this year of Saturn
5 vehicle, and they had a timing chain problem. The problem is,
6 they should be excepted from it, because it's been repaired and
7 covered. There aren't any -- they don't have any damages.

8 And we see this time and time again in class action
9 jurisprudence. It's one of the reasons why classes are
10 required -- they're required to replead and narrow and so
11 forth. And it's just an initial reason why, in normal civil
12 litigation, if this were a class certification hearing, this
13 class would never pass muster, because it's not -- it's
14 overbroad. The problem technically in the literature is
15 defined as ascertainability. But I think ascertainability is a
16 little bit of a misnomer there. It's really people who haven't
17 been damaged. It's overbroad.

18 THE COURT: Um-hum. Okay. Keep going, please.

19 MS. ZAMBRANO: So then the other thing I just want to
20 say about 23(a) in addition is I can't quarrel presently about
21 typicality and adequacy, because I haven't had discovery. All
22 I have are the plaintiffs' allegations in their complaint -- or
23 excuse me, in their affidavits that were attached, of course,
24 for the first time, to the papers they filed about a week or so
25 ago -- two weeks now.

1 And in normal practice, we would of course test those
2 affidavits to determine if there were something about the named
3 plaintiffs' allegations that were not typical, or if there were
4 some reason that they had a defense or some other reason about
5 their claim that they would not be adequate representatives.
6 Perhaps they didn't have the type of -- perhaps they didn't
7 provide the type of notice that is required, for example, under
8 one of these consumer statutes. And that would mean that they
9 would not be an adequate representative under that statute.

10 And I just simply haven't had the discovery. So right
11 now, I can't quarrel about those things, and I'm going to leave
12 23(a) alone. But I want to note that, that normally we would
13 have the discovery and we would need an opportunity to contest
14 those things.

15 THE COURT: Pause, please, Ms. Zambrano. Mr. Schwartz
16 filed a claim on behalf of his classes. Lawyers so often do on
17 behalf of clients. But my understanding is that there are
18 certain live human beings who are his class representatives in
19 the underlying suit. I take it you have no objection, if I
20 deny class action certification, to allowing the particular
21 named claimants to file individual claims.

22 MS. ZAMBRANO: We do not. And I'd have to consult
23 with Mr. Falabella or Mr. Smolinsky, who's not here, as to
24 whether that's an appropriate filing -- the appropriate filing
25 has already been made by Mr. Schwartz on behalf of those

1 individuals or we would have them file additional or amended
2 papers. I don't know.

3 THE COURT: You recognize that in a blink of an eye, I
4 could give the named plaintiffs authorization to file late
5 proofs of claims --

6 MS. ZAMBRANO: Exactly.

7 THE COURT: -- even if Mr. Schwartz's having
8 previously done so wouldn't have already skinned the cat?

9 MS. ZAMBRANO: Yes. Outside of bankruptcy principles,
10 I know of no reason why there --

11 THE COURT: You've got the problem you're a general
12 civil litigator, and you're going to hand off to your
13 bankruptcy colleague --

14 MS. ZAMBRANO: I can't agree to something bankruptcy
15 related, or it makes me nervous to do so, I should say.

16 But I don't have any problem with their individual
17 claims. It's the class component of their claim that's the
18 problem and why I'm here.

19 THE COURT: Um-hum. Okay.

20 MS. ZAMBRANO: So turning, then, to Rule 23, Mr.
21 Schwartz did a nice job, I think, of going through the
22 different types of classes that he is seeking to certify and
23 that is certainly better than we have dealt with in apartheid
24 and many cases that I deal with. The problem, however, is that
25 if you look on pages 28 through 42 of his brief, where you go

1 through every one of the causes of action that those classes
2 would be seeking, all of them have a causation component. And
3 that makes sense.

4 None of them are strict liability statutes. They have
5 a causation requirement. So that was very much skipped over in
6 the presentation. But --

7 THE COURT: I've got to tell you that when I read the
8 papers, I wasn't as concerned about his causation claim,
9 because it seemed to be very different than the apartheid
10 thing. If you got a bad timing belt, whether it's caused the
11 whole engine to crack from cylinders flying in different
12 directions -- I don't claim to be the automotive engineer that
13 either Mr. Schwartz is or his expert is -- I've had timing
14 belts come very close to failing, and I remember how scared I
15 was about that. But that's divorced of the record. I can
16 understand why a consumer would want a good timing belt.

17 And it seems to me, whether the damages are simply the
18 cost of replacing the belt, which is a bigger production than
19 replacing a fan belt -- again that's divorced of the record,
20 but it's my understanding -- or if the whole engine craters on
21 you, that would seem to be just a matter of damages. I don't
22 see that as a matter of causation. You've got a problem either
23 way.

24 MS. ZAMBRANO: I think it is an element of causation.
25 Because just because they have that defect -- I've also had a

1 timing belt break. And I didn't have the problem that Mr.
2 Schwartz has described. That is --

3 THE COURT: You didn't have the whole engine crater on
4 you, but I assume you had to pay the cost of -- unless it was
5 under warranty -- of getting the belt replaced?

6 MS. ZAMBRANO: It was a pretty bad Ford Escort
7 experience. Yes, it was --

8 THE COURT: I understand.

9 MS. ZAMBRANO: -- but --

10 THE COURT: I do -- let's confess, I have a sympathy
11 for consumers who are facing this issue.

12 MS. ZAMBRANO: Absolutely. But what the statutes here
13 require, they're not strict liability. So there would be
14 common proof as to the issue of the type of defect that their
15 expert has testified about. But there would not be common
16 proof as to what each one of those 390,000 -- over 390,000
17 vehicles, why their timing chain broke.

18 Again, I would cite this case Sanneman from
19 Pennsylvania. It was very similar. They had -- it was
20 Chrysler vehicles. And there was a problem with the paint in
21 the vehicles -- the way that the paint was applied. And the
22 allegation was that the paint, the way that it was applied, it
23 chipped, because of the way that it was applied. And again,
24 they had an expert from the plaintiffs' side that said you have
25 this type of application, you always have the chipping.

1 Well, we haven't had a chance to present from a
2 causation standpoint, our side of that story. But we don't
3 agree with that. So we don't agree with just because there is
4 a defect that's necessarily why every one of these 390,000
5 vehicles either have or will have a timing chain break. And
6 that is what is required to prove for someone to recover,
7 legally, under any of those causes of action.

8 You can't just prove the defect and say ipso facto you
9 have damages -- what are you damages because you've had a
10 timing chain break. There's a causation requirement.

11 THE COURT: Well, given the facts that we have, does
12 the consumer have a claim saying my chain hasn't broken yet,
13 but given everything we know, I want it replaced with one
14 that's properly lubricated?

15 MS. ZAMBRANO: I don't know if they'd have the right
16 elements there. They don't have any damages. So I would say
17 no in that instance. But the Sanneman case dealt with these
18 same issues and they talked about the problem of having to --
19 how do you test cars? Your Honor had some questions in the
20 beginning of how do you know if somebody has this problem. It
21 requires an individual examination as to whether this car has
22 this defect, and ultimately, whether that defect caused them
23 any damages. So I do think that is a pervasive problem.

24 THE COURT: Well, is it a production defect or is
25 it -- I thought the allegation is it's a design defect?

1 MS. ZAMBRANO: I think it's an alle --

2 THE COURT: For failure to properly put in enough
3 lubrication. But this would be an issue vis-a-vis every car,
4 as contrasted to one where some worker forgot to put the
5 lubrication in.

6 MS. ZAMBRANO: Yeah. I think it I a design
7 allegation. But that doesn't stop the fact that all of the
8 cases that look at -- they're alleging certain allegations,
9 certain causes of action, that require causation. There are
10 consumer statutes around the country that are strict liability.
11 These aren't those. They have causation requirements. And in
12 this instance --

13 THE COURT: These particular statutes?

14 MS. ZAMBRANO: Every one of them. And I checked. The
15 other stat -- some of the statutes also require reliance. And
16 obviously Your Honor knows the difficulties of that, of proving
17 reliance, and the individual nature of that inquiry.

18 In addition, some of the statutes have notice
19 requirements. And again, you have your -- the 23(a) problems,
20 which I've already described, with making sure somebody made
21 the notice that they're supposed to under the statute to be an
22 adequate representative. But then again, every individual that
23 is part of that class has to establish the common elements.
24 And they have to have provided that notice. That's individual
25 proof that's going to swamp any common issues with respect to a

1 defect. So I think those are the main problems with
2 predominance.

3 Now, I want to talk about superiority for a moment.
4 Obviously there is the fact that we are in bankruptcy court and
5 there was a ready alternative for people that have suffered
6 this problem to come and get relief. And that is, of course,
7 to file a proof of claim.

8 I think it is notable that we have not seen any other
9 people do that, because outside of the notice that was provided
10 in the bankruptcy court, the only thing that a class action
11 process would provide is more publication notice. And what
12 we've seen already is, at great cost to the estate, we've
13 provided notice: if you have a claim against GM come and
14 assert it. And none of these people did.

15 So I am skeptical and I think it's a waste of the
16 estate's resources and other creditors -- a burden and
17 prejudice to other creditors, to hold up the distribution of
18 300 million dollars, while we do that kind of notice again,
19 given that we had no response to the first. So that's the
20 first point on superiority.

21 The second point on superiority is a little bit
22 different and something I've had to learn about. It's called
23 NHTSA, the National Highway Traffic and Safety Authority (sic).
24 Mr. Schwartz will correct me if I got that wrong. But it's
25 pronounced NHTSA. And in their pleadings they talk a lot about

1 NHTSA's investigation and so forth. And so I spent a little
2 time with that process. And what I've learned is that you can
3 accomplish all of the same things that they're trying to do in
4 a NHTSA investigation that they're trying to do here.

5 You can get a recall. And I thought, well, maybe
6 that's all you can get -- you can only get a recall, and maybe
7 that's not going to be sufficient for someone who has already
8 fixed their vehicle. They don't need a recall. They need
9 reimbursement. They also can provide orders for reimbursement
10 in that situation. So I think that's also an alternative --

11 THE COURT: And if the NHTSA acted, that would be --
12 you're saying it would a remedy, albeit, it would be New GM's
13 problem rather than -- who would --

14 MS. ZAMBRANO: That's my position.

15 THE COURT: -- who would fix these cars for consumers
16 if NHTSA -- I can't pronounce it the way you pronounced it --
17 said you got to do something here?

18 MS. ZAMBRANO: It definitely would be New GM, it is
19 our position, yes. And that is dealt with in the purchase and
20 sale agreement as well, although not as crystal clear as
21 probably everyone would like, on retrospect.

22 THE COURT: It might result in a dispute between Old
23 GM and New GM, or New GM might come in here, as it sometimes
24 does, saying protect me. But what's your understanding of New
25 GM's duty to belly up to the bar if the NHTSA were to say this

1 is serious enough to justify a recall?

2 MS. ZAMBRANO: My understanding, having read those
3 portions of the purchase agreement, is that they would have an
4 obligation. And that's why we put it in our papers. We talked
5 about this before.

6 THE COURT: There is an assumed liability, if you
7 will, or at least they haven't sought dispensation, to comply
8 with federal regulatory obligations of that character?

9 MS. ZAMBRANO: Correct. It is addressed. Although,
10 again, I don't think it's as clear as everyone in retrospect
11 would like it. We read it and felt comfortable that it was
12 addressed enough that that was -- that that would be what would
13 happen, according to us.

14 THE COURT: And would I be the forum who would make
15 that determination if it ever got to be there?

16 MS. ZAMBRANO: I don't know the answer to that. I
17 assume you would have jurisdiction over any disputes over the
18 purchase and sale agreement, yes, Your Honor. But I don't know
19 the answer to that definitively.

20 So that -- I mention all of this because I think that
21 is yet another device that is available to people in this
22 situation that does not leave them completely empty-handed,
23 particularly given that this is not theoretical. This
24 investigation has been ongoing, and NHTSA is very aware of this
25 problem, and there's some background here for them if they

1 really wanted this relief. So that's the 23(b) part of our
2 argument.

3 I'd like to address just very briefly the other
4 reasons, obviously, that this claim should be expunged. The
5 first one obviously being the timing. And I won't belabor
6 this. The Court has spent a lot of time with the relevant case
7 law in this area. But the law simply isn't that you're
8 supposed to wait. The law is that you're supposed to act
9 promptly, as soon as reasonably practical. That's in
10 accordance with Rule 23 itself and the precedent of this Court.
11 And certainly, these claimants have unfortunately waited longer
12 than the apartheid claimants waited. And that really will have
13 an effect -- 300 million dollars in this estate, it will hold
14 up that distribution to other folks. So that's number one.

15 The number -- the second reason is that the
16 discretion, of course, to permit a class in bankruptcy is used
17 so sparingly, as Your Honor noted in the apartheid decision,
18 really only treated or handled in two different kinds of cases;
19 one when there's been a precertification case. And as Your
20 Honor probably noted from the case law, I don't even think it's
21 a slam dunk then. I mean the Ephedra case talked about --
22 there was one case in that decision that had been certified
23 before. And the Court did not permit it to proceed as a class
24 in that case.

25 We don't have that here. And in fact, we don't have

1 that in any of the cases where there have been class proofs of
2 claim in the Southern District of New York; reported,
3 unreported, I can't find a decision where someone was not
4 certified before and was permitted to go forward.

5 THE COURT: Other than by consent?

6 MS. ZAMBRANO: Other than by consent. Yes, Your
7 Honor. And just for the record on that, we have -- we have not
8 consented to any cases to go forward as class claims that were
9 not certified prior to the petition.

10 The Saturn claimants attempt to avoid that law by
11 focusing on a narrow exception in the case law that was much
12 more relevant, in my view, in the apartheid decision; and
13 that's the notice exception. I haven't ever seen a case
14 actually apply the notice exception, but they sort of talk
15 about it in most of them.

16 THE COURT: All right. Your point here is -- and I
17 take it you got my message in the apartheid decision that I
18 wasn't pleased with the quality of the notice that went to
19 those other people in South Africa. But you're saying that
20 those problems are totally inapplicable here in the United
21 States?

22 MS. ZAMBRANO: That's correct, Your Honor. And so the
23 claimants -- in conclusion, the claimants simply waited too
24 long here to assert their class claims in this bankruptcy. It
25 will clog up this process. I do need to depose all of those

1 people -- the named plaintiffs -- if we are going to proceed as
2 a class. I do need to depose their expert with respect to the
3 statements he made about commonality and causation. And so it
4 would clog up this 300 million dollars. We would have to set
5 it aside while this Saturn litigation grinds on. And I don't
6 think that's appropriate, given that we're mere weeks away from
7 confirmation.

8 And even if you were to overlook those problems that
9 are very real under the case law, you get to Rule 23. And
10 while I do think they have a better case for certification
11 under Rule 23(b) than the apartheid plaintiffs did, they still
12 suffer from major predominance and superiority problems and
13 with the additional problem that's in the case law of the
14 ascertainability.

15 Unless the Court has any other questions, that will
16 conclude my presentation.

17 THE COURT: No, thank you, Ms. Zambrano.

18 Mr. Schwartz?

19 MR. SCHWARTZ: Thank you, Your Honor. I'll try to be
20 brief. One issue I would like to clarify is it's not a 300
21 million dollar claim. When I was going through the papers last
22 night preparing, I realized that the expert made a mistake, and
23 the 300 million dollars would be if it was all fifty states.
24 Since it's not, it's probably just south of 100 million
25 dollars.

1 THE COURT: Just south of 100 million?

2 MR. SCHWARTZ: Correct.

3 THE COURT: Okay.

4 MR. SCHWARTZ: And we can get an exact number on that.

5 THE COURT: And help me understand the significance of
6 that capping liability. I saw reference to that in the briefs.
7 Perhaps before argument I should have gone back to the
8 underlying declaration to better understand that event. What
9 was that?

10 MR. SCHWARTZ: I believe Your Honor is referring to we
11 had filed a claim capping letter agreeing to reduce the amount
12 of the claim in order to get into a mediation over the claim.
13 And there was correspondence with debtors' counsel about moving
14 it forward and --

15 THE COURT: You're talking about like Rule 408 type of
16 stuff, that is not particularly relevant to what I'm doing now?

17 MR. SCHWARTZ: Correct, Your Honor.

18 THE COURT: Okay.

19 MR. SCHWARTZ: Correct.

20 THE COURT: Then I don't want to probe further in that
21 area.

22 MR. SCHWARTZ: Okay.

23 THE COURT: But one thing that occurred to me when Ms.
24 Zambrano was speaking as to something that I needed to come
25 back to you on is -- and it came up principally in the context

1 of ascertainability of class members -- and that is that your
2 proposal for dealing with the uncertainty as to who would have
3 claims would be to wait until they file their class action
4 proofs of claim or their pieces of paper to participate in the
5 recovery showing what damages they had suffered, what nature of
6 injury they had suffered. It wasn't just damages but how they
7 were injured.

8 How do I, as a judge, determine what pile of money has
9 to be taken from the other creditors to satisfy these
10 creditors, unless I know who has got membership in the class
11 and who has the injury that is the predicate for putting money
12 into the pot for this class, even before you get to the
13 subclasses? Although the claims of the different subclasses
14 would seemingly have an effect on the aggregate class as a
15 whole, I don't see how one computes the aggregate damages if
16 you don't know who's in it.

17 MR. SCHWARTZ: Well, I think Your Honor touched on
18 that, I believe, in the apartheid case. I think we could do a
19 statistical analysis with experts to determine the incidence of
20 when these timing chains would break, over how many miles, and
21 how many cars would have been on the road at that point -- how
22 many cars -- you would have to have bought the car new, not
23 used, so it could be determined how long people owned a new car
24 and whether the incidence would have occurred during the time.
25 So I think it can be done. It can be readily done with experts

1 and a statistical analysis.

2 THE COURT: Um-hum. Okay. Continue, please.

3 MR. SCHWARTZ: Okay. With respect to causation, Your
4 honor, I don't agree with Ms. Zambrano's thinking on it,
5 because the causation here -- first of all it's a timing chain
6 not a timing belt. And a timing chain is supposed to last the
7 life of the vehicle. So when you have a timing chain breaking
8 and you have an expert opining that the oiling nozzle is
9 defective when it rolls off the assembly line, because it's not
10 going to properly lubricate the timing chain, and the timing
11 chain, which again, is supposed to last the life of the
12 vehicle, breaks, I think you have causation.

13 And I think courts in those circumstances would find
14 causation. I don't think that'll be a problem for the
15 individual state breach of implied warranty law claims, or for
16 the consumer fraud claims. I think causation is not an issue.

17 With respect to superiority, again, I think my point
18 which I made when I began is that the notice in the bankruptcy
19 here notified people of GM's bankruptcy and the right to put a
20 claim. It did not notify purchasers of these vehicles that
21 there are allegations that Old GM sold them vehicles which were
22 defectively designed. A class action notice would notify
23 potential class members of that. And that's a big difference.
24 That's a big distinction between the bankruptcy notice and what
25 a class action notice does.

1 And we understand that a bankruptcy notice can
2 probably not do that with all the different -- especially with
3 a company like Old GM. But in a class action notice, which is
4 specifically to notify potential class members of the claims
5 that they may have, it's very different. I think that would be
6 more appropriate than to notify potential class members of
7 their claims here.

8 With respect to NHTSA, Your Honor, I think the claim
9 is you can get the similar relief from NHTSA. NHTSA has not
10 done anything. NHTSA's been investigating this for years. Old
11 GM, we believe, placated NHTSA by doing that 20,000 car limited
12 recall by showing NHTSA some statistics that we don't believe
13 were valid because our plaintiffs and plenty of other people
14 have VIN numbers which show they were made after that three-
15 month window which Old GM recalled. So we don't believe
16 relying on NHTSA is a viable alternative, because they haven't
17 acted and people are damaged and people have been damaged since
18 2002/2003, and no action has been taken.

19 I don't have anything else, Your Honor.

20 THE COURT: Very well. All right. We're going to
21 take a break, and I would like all of you back here at 11
22 o'clock. I can't guarantee you that I'll be ready at that
23 time, but I would ask that you be back here then.

24 You're authorized to use your cell phones in the
25 courtroom. I gather now you don't need a waiver from the

1 marshals. You've been allowed to bring them upstairs. But be
2 sure they're on vibrate or mute so they don't ring, if you've
3 decided to turn them on. We're in recess.

4 (Recess from 10:35 a.m. until 11:50 a.m.)

5 THE COURT: Have seats, please. I apologize for
6 keeping you all waiting.

7 In the jointly administered Chapter 11 cases of debtor
8 Motors Liquidation Company, formerly General Motors
9 Corporation, which I refer as Old GM, I have a contested matter
10 evolving from a lawsuit brought against Old GM pre-petition
11 which, after the filing of proofs of claim by the plaintiffs,
12 now are before me in the form of claims against the Old GM
13 estate. The lawsuit was brought on behalf of a putative class
14 of persons who owned certain Saturn vehicles across various
15 states and the District of Columbia. These claims are alleged
16 to arise from a design defect in timing chains and oiling
17 nozzles used in Saturn vehicles.

18 I conclude that class certification, which is
19 discretionary in bankruptcy cases, must be denied under the
20 facts presented here. I'm denying class certification and
21 disallowing the claims of absent class members, for most but
22 less than all of the reasons set forth in part one of my recent
23 apartheid decision in this case. I'm going to summarize the
24 reasons here. But if the class action plaintiffs wish to
25 appeal or seek leave to appeal, I'll issue full findings of

1 facts, conclusions of law and bases for the exercise if my
2 discretion. And I'll do so at or before the entry of the order
3 implementing these rulings. But the following summarizes the
4 bases for the exercise of my discretion in this regard.

5 Just a few weeks ago, in part one of the apartheid
6 decision, which as yet doesn't appear in the B.R., but which is
7 at 2011 Bankruptcy LEXIS 240, 2011 W.L. 284933, I addressed
8 class certification issues. Obviously that decision is
9 extraordinarily on point here.

10 In the apartheid decision I denied class certification
11 for a number of reasons, including a failure to satisfy the
12 requirement of Federal Rule of Civil Procedure -- what we
13 bankruptcy judges refer to as Civil Rule 23(b)(3), that common
14 issues predominate, the Civil Rule 23(b)(3) requirement that
15 class action treatment be superior, the late filing for class
16 certification, and because of other particular needs and
17 concerns of the bankruptcy system, particularly where a class
18 hadn't been certified pre-petition, and the debtor didn't
19 consent to class action certification.

20 Here I find that the class action proponent's position
21 on Civil Rule 23(b)(3) predominance of common issues is
22 stronger than it was in the apartheid decision, making that
23 issue more debatable. But ultimately, I don't need to decide
24 and don't today decide whether the 23(b)(3) predominance
25 requirement has been satisfied, because all of the other

1 factors require me to deny class action certification in this
2 Chapter 11 case, just a few weeks before the scheduled
3 confirmation hearing, in any event.

4 I'm not now going to repeat all of the underlying law
5 applicable to matters of this character. I discussed them in
6 depth just a few weeks ago in the apartheid decision. And for
7 understandable reasons, class counsel doesn't dispute the
8 underlying law or legal standards or otherwise debate either
9 the holding of my recent apartheid decision or the legal
10 principles or reasoning it contained.

11 Turning first to class action superiority, the second
12 of the two requirements that Rule 23(b)(3) imposes, and which,
13 at the risk of stating the obvious, is in addition to the
14 requirement for the predominance of common issues. The points
15 I made in the apartheid decision about class action treatment
16 not being superior are equally applicable here. Assuming,
17 arguendo, that we could conquer the class action predominance
18 issues by setting up enough subclasses and plow through the
19 individual law of twenty-six states as applicable to the claims
20 of members of those various classes, that would place
21 tremendous strain on the bankruptcy system and the resources of
22 this Court in particular.

23 And class action treatment wouldn't be superior to the
24 mechanisms that are available in a bankruptcy court, for the
25 reasons I noted in the apartheid decision, based in material

1 part on Chief Judge Bernstein's decision in Musicland, as he
2 had there pointed out, the inherent simplicity of the
3 bankruptcy process tends to make class action treatment not
4 superior, as a general matter, and in this case, because an
5 individual claimant would need only to fill out and return a
6 proof of claim form. Further, the deterrence that class
7 actions often provide would be of little utility in a case like
8 this one, where Old GM is liquidating and the punishment for
9 any wrongful Old GM conduct would be borne by Old GM's innocent
10 creditors. See Musicland 362 B.R. at pages 650 to 651.

11 Turning now to unique bankruptcy concerns. First, I
12 noted in the apartheid decision that the motion for class
13 certification should have been made much earlier in that case,
14 citing the Ephedra cases and Northwest Airlines; and that late
15 motions of this character raise concerns when they would have a
16 material effect on distributions to other creditors, as the 100
17 million dollars in claims asserted here so obviously would.

18 I ruled there that late filing would not, by itself,
19 bar class certification, but that it was an important factor.
20 My thinking in that respect hasn't changed in the three weeks
21 since I ruled on that issue before. It's not relevant for
22 purposes of placing blame, but it's relevant because late
23 motions of this type have a major effect on the administration
24 of the Chapter 11 case and on potential prejudice to creditors.

25 Here, the Saturn plaintiffs failed to file a motion

1 for class action treatment until fourteen months after Old GM's
2 bar date and twenty months after the commencement of Old GM's
3 bankruptcy. Given the substantial impact that almost 100
4 million dollars in claims could have on the Old GM estate, the
5 Saturn claimants should have sought class certification here,
6 just as in the apartheid litigation, far sooner than they did.
7 And that concern is particularly significant and perhaps
8 obvious, when we have a confirmation hearing set for March 3,
9 only three and a half weeks away. The issues presented here
10 would take extraordinary court resources to hear in an
11 allowance hearing or even to estimate under Section 502, and
12 where until and unless the claims were fixed or estimated, we'd
13 have to set up a 100 million dollar reserve.

14 Secondly, we here have a variant of the point I made
15 before, which is relevant in this different context. Once
16 again, assuming that I could deal with the predominance issues
17 by setting up enough subclasses, the issues dealing with the
18 twenty-six states' separate laws and the particular issues as
19 amongst the various subclasses and other aspects of the
20 individual nature of consumers' claims, dealing with this,
21 would just place too much strain on the bankruptcy system and
22 on this Court.

23 As Judge Rakoff observed in the Ephedra litigation,
24 bankruptcy significantly changes the balance of factors to be
25 considered in determining whether to allow a class action. And

1 class certification may be less desirable in bankruptcy than in
2 ordinary civil litigation. See his Ephedra decision at 329
3 B.R. at page 5. See also Judge Lifland's analysis very
4 recently in Blockbuster. Class-based claims have the potential
5 to adversely affect the administration of a case by adding
6 layers of procedural and factual complexity, siphoning the
7 debtor's resources and interfering with the orderly progression
8 of the reorganization.

9 For those reasons, among others, I must find that
10 entertaining these claims on a class action basis would
11 significantly complicate the GM debtors' Chapter 11 case here.
12 Thus, on a matter where bankruptcy judges have unquestioned
13 discretion to determine whether class action certification
14 would inappropriately clash with bankruptcy needs and concerns,
15 I can't authorize class action treatment here.

16 Finally, unlike the apartheid case, the quality of the
17 notice here is not even debatable. The notice within the
18 United States was unquestionably satisfactory. And as I noted
19 before, that is, in the apartheid litigation, the filing of the
20 GM Chapter 11 case was well known. Paraphrasing Judge Kaplan's
21 observation back in July 2009, on a stay application from my
22 363 decision, the filing of the GM Chapter 11 case was an event
23 of which no sentient American was unaware.

24 Here, the class is made up of U.S. citizens who are
25 car owners and who, it may reasonably be inferred, watch

1 television, listen to the radio, read newspapers and knew any
2 problems that had infected GM and had resulted in GM's
3 bankruptcy. It would be incorrect to argue that they did not
4 have notice. I'm not persuaded by the distinction that I heard
5 in oral argument that I should consider notice of GM's
6 bankruptcy to be an unsatisfactory substitute for telling
7 people that they have problems in their vehicles with respect
8 to their bad timing chains. If anyone had a problem with a
9 failed timing chain, he or she would know that and could easily
10 file a regular proof of claim in this case.

11 The debtors point out, without dispute, that there is
12 no decision in this district in which the Court has ever
13 exercised its discretion to make civil rule applicable in a
14 Chapter 11 case, where the class was not certified pre-petition
15 or the estate didn't consent. In this case, with confirmation
16 just three and a half weeks away, I'm not going to be the
17 first.

18 For the reasons I just summarized, I'm denying the
19 cross motion for class certification and I'm granting the
20 motion to disallow the claims insofar as they're asserted on
21 behalf of absent class members. However, I will authorize the
22 individual class representatives to file individual proofs of
23 claim for their personal damages underlying these claims,
24 within the later of the time agreed upon between class action
25 plaintiffs' counsel and the debtors, or thirty days from the

1 entry of the order denying class certification here.

2 If the individual class representatives elect to avail
3 themselves of the right I'm giving them to file individual
4 proofs of claim, I'm ruling that their doing so will be without
5 prejudice to any rights they have to appeal or leave to appeal.

6 The debtors are to settle an order in accordance with
7 the foregoing, but they're first to consult with Mr. Schwartz
8 and to find out from him, whether he'd like to appeal or seek
9 leave to appeal or otherwise wants me to make full findings of
10 fact, conclusions of law and bases for the exercise of my
11 discretion. I have many things on my plate, and obviously I
12 think this capsulizes the bases for my ruling. But if it's
13 desired, I will make more extensive full findings, as I did on
14 the apartheid decision. Mr. Schwartz is entitled to that, and
15 if he's of a mind to, he's entitled to that before or at the
16 time that I enter the order.

17 I appreciate your indulgence. We've now gone through
18 the whole morning, and I made you wait a while for this
19 decision. We're now adjourned. Have a good day.

20 (Whereupon these proceedings were concluded at 12:07 p.m.)
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I N D E X

RULINGS

	Page	Line
Class certification is denied	36	18
Claims of absent class members are disallowed	36	20
Individual class representatives may file	42	21
individual proofs of claim for personal		
damages		

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a
true and accurate record of the proceedings.

**Sharona
Shapiro**

Digitally signed by Sharona Shapiro
DN: cn=Sharona Shapiro, c=US
Reason: I am the author of this document
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Date: February 11, 2011